SCOTTISH LAW COMMISSION

TERMINATION OF LEASES: CONTRACTING OUT OF THE STATUTORY NOTICE PROVISIONS

CONSULTATION PAPER

This Consultation Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments on this Consultation Paper were submitted by 10 October 1986. All correspondence should be addressed to:-

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Note: In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in respect of this Consultation Paper. Any requests from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultation Paper can be used in this way.

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PART I: INTRODUCTION

1. We received from the Lord Advocate and the Secretary of State for Scotland a reference under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:-

> "To consider and advise on procedural and related requirements in connection with the recovery of possession of heritable property, with particular reference to notices to quit, title to sue and to defend in actions for recovery of possession, and the relevant court procedures, with a view to rationalisation and simplification of the law."

2. In January 1984 we published our Consultative Memorandum No. 59 on Recovery of Possession of Heritable Property ("the Memorandum"), simultaneously with a research paper entitled "Actions of Ejection and Removing", which we had commissioned from Mr A.G.M. Duncan, former Senior Lecturer in the Department of Scots Law at Edinburgh University. In these publications the law relating to notices of termination of leases was examined. The Memorandum concluded with a Summary of Questions, and observations on these were welcomed. Appended to the Memorandum was a short paper by Mr John Murray, Q.C., one of our members, discussing some of the specialities relating to the termination of leases of agricultural holdings.

3. Having received a number of valuable comments in response to the Memorandum, and having considered these and formulated our own recommendations, we commenced the preparation of our Report, together with a draft Bill to be annexed thereto which would reflect these recommendations. At this stage, the judgment of the Second Division of the Court of Session was given in the case of Morrison's Exrs. v. Rendall ("Morrison's Exrs.")[1] It was apparent that this judgment raised an issue of law which was related to, and which might have implications for, our current exercise on recovery of possession of heritable property.

4. This issue concerns the entitlement of parties to an agricultural lease to make an enforceable agreement to contract out of the statutory notice requirements relating to termination of such a lease, which are contained in section 24(1) of the Agricultural Holdings (Scotland) Act 1949 ("the 1949

Act"). That provision contains a prohibition on contracting out therefrom. Section 24(1) reads as follows:-

> "Notwithstanding the termination of the stipulated endurance of any lease of an agricultural holding, the tenancy shall not come to an end unless, not less than one year nor more than two years before the termination of the lease, written notice has been given by either party to the other of his intention to bring the tenancy to an end.
>
> The provisions of this subsection shall have effect notwithstanding any agreement or any provision in the lease to the contrary."

In Morrison's Exrs. it seems to have been generally agreed that the last sentence of the provision applied so as to prohibit agreements to so contract out made in the lease itself or in advance of the commencement of the lease. There was however argument as to whether this prohibition extends further than this, so as to prohibit agreements made during the currency of the lease. This seems to raise two points. First, whether parties to an agricultural lease could, during the currency of the lease, simply terminate the lease at any time - i.e. without giving either the full statutory period of notice or indeed any notice - by entering into a binding agreement to this effect; and second, whether the parties to such a lease can enter into a binding agreement, during the currency of the lease but without then terminating it, that a shorter period of notice than that provided by statute will apply in relation to the termination date, when that date occurs.

5. The purpose of this Consultation Paper is to examine the issues of law raised by Morrison's Exrs. In Part II, we seek to identify any circumstances in which parties to a lease (either agricultural or non-agricultural) may wish, during the currency of a lease, to agree to contract out of statutory notice provisions relating to termination of the lease. Part III is concerned with agricultural leases. We consider the legal position of such agreements in that context, first before Morrison's Exrs., and then following the decision in that case. The current legal position is then examined in order to establish whether it is in accordance with the policy objectives of the legislation, and lastly, in the light of this, we review generally the prohibition in section 24(1) of the 1949 Act.

6. While Morrison's Exrs. relates to agricultural leases under the 1949 Act, the decision would also however have implications for the termination of non-agricultural leases, in the context of the recommendations which we may make[2] in our forthcoming Report on Recovery of Possession of

Heritable Property. We therefore continue our examination of the law on this matter in Part IV in relation to non-agricultural leases.

7. We invite views on the questions raised. A summary of these questions is given in Part V.

PART II: CONTRACTING OUT AGREEMENTS IN PRACTICE

8. Various types of circumstances can be envisaged in which parties to a lease, either agricultural or non-agricultural, may wish, during the currency of the lease, to contract out of the statutory notice provisions relating to termination of the lease. The first is where, during the currency of the lease, one party wishes termination of the lease to take place either with immediate effect, or at least at some time before the due date. This type of situation might occur where that party wishes to be freed of the obligations of the lease - the tenant may want to take up an offer of employment, or even enter into a tenancy elsewhere, or the landlord on the other hand may want to use the leased subjects himself, or put the subjects to an alternative use. In any of these cases, the other party to the lease may, perhaps in return for an incentive such as a financial consideration, be happy to agree to the proposed termination.

9. Another type of circumstance is where, by omission, the requisite notice of termination has not been served timeously. Both parties may in fact wish termination to take place on the due date, and may wish to agree that this should be so, with either no notice being given at all, or on the basis of there being given a shorter period of notice than that provided by statute.

10. Also, there may be cases in which, during the currency of the lease itself, parties might wish to agree that a shorter period of notice than that stipulated in statute will apply in relation to the termination date of the lease. This might occur particularly in relation to a lease which is running from year to year on tacit relocation, and especially an agricultural lease, since in terms of section 24(1) of the 1949 Act, a long period of notice is required to terminate such a lease - a period of between one and two years. An illustration of this type of situation is provided in the following paragraph, in an example which has similarities to the circumstances of the parties in Morrison's Exrs.

11. Take a farm which has two heritable proprietors, A and B. The farm is let to a tenant and is running from year to year on tacit relocation. Proprietor A becomes ill, and Proprietor B then calculates that, should A's death occur during the running of the lease, then he, B, would need to or wish to sell the farm as quickly as possible. B would not necessarily want, in the event of the possible death of A, to rely at that time on the hope that the tenant would then co-operate in coming to an agreement to end the lease, or accept a shorter period of notice than that provided in the statute. B might therefore wish to secure his position by obtaining in advance a valid and enforceable agreement with the tenant that only a period of, say, one month's notice will be given before the termination date. The tenant would no doubt receive a sum of money in return for his entering into such an agreement. If in the event Proprietor A happens to die, say in June during a later year of the lease, and the lease is on tacit relocation from each August, Proprietor B would then have an enforceable agreement to send notice to quit to the tenant in July, so as to terminate the lease in August, at which time he can then sell the farm. If B had not earlier obtained such a contracting out agreement, and if in the event of A's death B failed to persuade the tenant to agree to accept a short period of notice, Proprietor B would then have to give the tenant one year's notice in or before August so as to terminate the lease at the following August.

12. There may be similar instances of this type of situation where the landlord is hoping to apply for and obtain the grant of planning permission for an alternative use of the leased subjects. He may wish to be in a position at that date to obtain vacant possession of the subjects as soon as possible after receiving planning permission, and he may therefore wish also to secure this position in advance by obtaining an agreement to the effect that only a short period of notice will be given in this event.

13. To conclude, we therefore think that there are, in practice, various circumstances in which both parties to a lease may wish to avail themselves of an opportunity to agree, during the currency of a lease, to contract out of the statutory notice provisions relating to termination. We understand that such contracting out agreements are in fact made and carried out in practice - or, in relation to agricultural leases, were made and carried out at least until the decision in Morrison's Exrs.

PART III: AGRICULTURAL LEASES

The position in Scotland before Morrison's Exrs.

14. A lease is a contract, and as a general rule, parties to a lease enjoy freedom of contract. Under the 1949 Act, parties' freedom of contract is however regulated or modified by various provisions. Some of these provisions expressly forbid,[1] and others expressly permit,[2] contracting out. We are concerned here with section 24 of the Act. This section, which relates to the giving of notices to quit, contains an express prohibition on contracting out. The section provides that the tenancy shall not come to an end unless the appropriate written notice has been given, and we draw attention again to the terms of this prohibition in the concluding sentence of subsection (1), which reads as follows:-

> "The provisions of this subsection shall have effect notwithstanding any agreement or any provision in the lease to the contrary."

15. One view of the interpretation of this provision, as found in a textbook on leases,[3] is simply that contracting out is prohibited. This view seems also to have been taken by the court in Kennedy v. Johnston,[4] though the comments there made on section 24 were obiter. Two of the judgments in that case contrasted the wording of the provision of the 1949 Act in issue there, namely section 20, (which permits a tenant to bequeath his lease, and which does not contain an express prohibition on contracting out of the section) with other provisions of the Act, including section 24, which were stated to contain an express prohibition on contracting out.[5] In stating this view however neither the writer nor the court in question seem to have given specific consideration to the possibility of contracting out during the currency of the lease, as opposed to doing so in advance of the commencement of the lease.

16. On the other hand, an interpretation of this provision as having a more restricted effect is taken by Gill in his textbook, The Law of Agricultural Holdings in Scotland[6] as follows:-

> "The words 'notwithstanding any agreement or any provision in the lease to the contrary.' occurring in section 24 do not prohibit parties from contracting to terminate the lease during its currency. These words signify that the protection of the section cannot be contracted out of ab ante; but the parties may agree during the currency of the tenancy to bring it to an end, without the statutory formalities and period of notice, at whatever date and on whatever terms they choose."

It is also stated by Gill[7] that this view is implied in section 10 of the 1949 Act. The terms of this section[8] appear to recognise that, but for the provisions of the section, a landlord or tenant would be entitled by reason of changes made to the terms of a lease to bring proceedings to terminate it. In any event it expressly entitles either landlord or tenant, with the consent of the other, to treat the lease as being at an end in such circumstances.

17. It seems to have been argued before the Court in Morrison's Exrs. that the view expressed by Gill was in fact the "received opinion" on this matter. The authorities cited in support of this were reviewed by the Court, and an interpretation of the provision was given.

18. Before considering that case, it should first of all be mentioned that parties to a lease, either agricultural or non-agricultural, can, instead of agreeing to terminate the lease by contracting out of the statutory notice provision, apparently achieve the same result in practice by using the common law method of renunciation of the lease.[9] Renunciation of a lease is a consensual arrangement, constituted by an offer from the tenant to renounce the lease, and acceptance thereof by the landlord. In this Part of the Paper, we are of course primarily concerned with the working of the statutory scheme contained in the 1949 Act in relation to agricultural leases. However there does have to be borne in mind that it is obviously desirable to achieve consistency in the law, between what is open to parties in terms of statute on the one hand, and under the common law on the other hand.

The Decision in Morrison's Exrs.

19. The facts of this case are as follows. The defender was the tenant of a farm, of which the pursuers were the heritable proprietors. The contract of lease was based on missives of let which were renewed on a yearly basis for the period from 1 March to 31 January. This arrangement was followed so that the farm could be sold on the death of Mrs Morrison, who was one of the heritable proprietors. Each time the lease was renewed for the period from 1 March to 31 January the defender signed a letter of removing undertaking to remove from the farm at 31 January. The last executed missives of let were for the period from 1 March 1981 to 31 January 1982, at which last-mentioned date the defender, in terms of a letter of removing, undertook to remove. An

offer of renewal of lease for the period from 1 March 1982 to 31 January 1983, and a letter of removal, were sent to the defender for signature but were never signed by him. Mrs Morrison died on 1 April 1982. The pursuers averred inter alia that the defender then stated that he would remove from the subjects let at 31 January 1983; that this offer or undertaking had been accepted by the pursuers; that the defender failed to remove; and that the pursuers were accordingly prejudiced thereby because they were unable to offer the subjects for sale at an open market valuation. The pursuers conceded that at the date of the expiry of the last written agreement, 31 January 1982, the defender enjoyed the tenancy of an agricultural holding under the 1949 Act, and that the letters of removing signed along with the execution of that last agreement were invalid.

20. Accordingly there remained two main issues for the court to consider. The first of these is the relevant one for the purposes of this Consultation Paper, namely, whether there was a concluded agreement between the parties which validly terminated the tenancy as at 31 January 1983, so that the defender was contractually bound to vacate the farm at that date.

21. In his judgment the Lord Justice-Clerk considered the terms of section 24(1) of the 1949 Act, and in particular whether the words "any agreement" occurring in the last sentence stood on their own, rendering all contracting out agreements ineffective, or whether these words referred only to an agreement in the lease itself. He preferred the former view, holding that the phrase "in the lease" qualified "any provision" but not the words "any agreement". He stated:-

> "... parties are not entitled to contract out of section 24(1) either by making a provision in the lease to the contrary or by making a provision to the contrary in a separate agreement. Unless the words are construed in this way, the result would be that parties could execute a lease, and shortly thereafter could execute an agreement containing provisions contravening this section. I do not believe that this can have been Parliament's intention."[10]

Earlier in his Opinion however, the Lord Justice-Clerk stated that parties could circumvent the statutory provisions, by a renunciation of the lease or by agreeing to a new lease in substitution for the old one.[11] It is not clear whether this statement means that parties could circumvent the statute by a renunciation which once made is enforceable, notwithstanding

the refusal by one party thereafter to implement the agreement; or whether such circumvention could only be achieved by a renunciation which has in fact been acted on by both parties. In a later statement in his Opinion the Lord Justice-Clerk did recognise that in practice parties may agree to terminate the tenancy without the statutory notice having been given, and that provided both parties acted upon such agreement, it would be effective.[12]

22. Lord Hunter and Lord Robertson held views similar to those expressed by the Lord Justice-Clerk on the interpretation of section 24(1). Lord Hunter commented on the reference made in the discussion before the Court to the "received opinion" that "separate agreements to remove were not covered by the concluding sentence of section 24(1)."[13] In his view, such received opinion "... does not conform to the literal or natural construction of the statutory provision nor, it may be added, to the intendment and policy of the statute."[14] Lord Robertson went on to say that his view of the interpretation of section 24(1) did not mean that a tenant may not give up a lease during its currency and remove from the subjects, or that both parties may not terminate a tenancy by agreeing to do so and acting upon such an agreement - such as by entering into a new lease.[15]

23. While the judgments of the Lord Justice-Clerk and Lord Robertson therefore reveal an acceptance of the fact that in practice, contracting out agreements may be made and acted upon, or the same result may be achieved by other methods, the decision in Morrison's Exrs. nevertheless appears to establish that, under the terms of subsection (1) of section 24 of the 1949 Act, the parties to an agricultural lease are not entitled to contract out of that provision either in the lease or otherwise in advance of the commencement of the lease, or during the currency of the lease. In particular this means that, in terms of the statute, parties to a lease cannot during its currency enter into an agreement enforceable in law either to terminate the lease before the due date without the required notice, or to terminate the lease at the due date with a shorter period of notice being given than that specified in statute. In establishing this, the decision appears to disagree with what was referred to in the case as, and what may have been, the "received opinion" in Scotland on this matter prior to the hearing of the case.

24. It seems certain however that, as shown in Part II of this Paper, there will continue to be situations in which parties to a lease will wish to contract out of the statutory notice provisions. This being the case, no doubt such agreements will continue to be made, but where one of the parties does not act upon the agreement, difficulties will be experienced.

25. Therefore the question which arises for consideration now is whether section 24(1), as interpreted in Morrison's Exrs., regulates the parties' freedom of contract to an undue extent. This leads into an examination of the policy of the Agricultural Holdings Acts ("the Acts") in so far as they relate to and affect the party's freedom of contract in this respect, in order to establish whether this policy in fact requires such a wide prohibition of contracting out agreements.

The policy of the Agricultural Holdings Acts

26. The policy behind the Acts has been examined by Scottish courts. In one case,[16] the Lord Justice-Clerk (Cooper), in describing the purpose of the Acts, quoted with approval and adopted the conclusion come to by Lord Salvesen in an earlier case,[17] namely, that while the Acts constituted an interference with freedom of contract in certain respects, this was "really in the interests of both landlord and tenant as well as the community at large to whose advantage it is that the arable land of Scotland shall be cultivated to the best advantage".

27. These interests, found in the Acts, were fully examined by the House of Lords in Johnson v. Moreton[18]. In this case their Lordships pronounced, in relation to the Acts, a doctrine of public interest. The case concerned a lease under the Agricultural Holdings Act 1948 ("the 1948 Act"). This Act was the English Act which corresponded to the 1949 Act. The main issue considered was whether the tenant could by agreement in the lease deprive himself of the option to serve a counter-notice under section 24(1) of the 1948 Act in response to a notice to quit. It was held that he could not do so because the terms of that provision were mandatory and consequently it was not necessary for it to contain an express prohibition against contracting out.

28. Lord Hailsham of St. Marylebone and Lord Simon of Glaisdale gave particular consideration to the ability of the parties to contract out of the statutory provision on the basis of the principle that a party may renounce

a right which exists solely for his own benefit and use. Their Lordships took the view, however, that this principle did not apply in a case in which a public interest was also involved. A fundamental distinction was drawn by them between those provisions affecting only the private contractual interests of the parties, such as the tenant's right to bequeath the lease, which parties are free to modify by contract; and those provisions involving public interest, such as the security of tenure provisions (which of course include the provisions requiring notice of termination), under which contracting out is not permitted. Lord Hailsham identified two separate but closely connected reasons to justify the recognition of public interest in the security of tenure provisions - the first concerned the proper farming of the land, and the second, the welfare of the tenant. He stated that public interest provisions were introduced with regard to the former "for the sake of the soil and husbandry of England of which both landlord and tenant are in a moral ... sense the trustees for posterity", and in regard to the latter, so as "to protect the weaker of two parties who do not contract from bargaining positions of equal strength."[19]

29. Their Lordships therefore identified this public interest policy as the reason for excluding contracting out of the security of tenure provisions in the lease itself. There were however indications in the judgments that whereas this public interest policy applied to and rendered unenforceable agreements to contract out of statutory provisions which have not been carried out, this policy might not apply to certain other agreements which have been made and carried out. Lord Hailsham, in ruling out contracting out of the public interest provisions of the Acts, qualified his use of the term "contracting out". He stated that, while a purely executory contract to contract out of statutory provisions may be unenforceable for the reasons he had already identified, there was clear authority that an executed agreement (i.e. an agreement which has been wholly performed by all parties) for good consideration which has been executed (i.e. performed) by the weaker party may be enforceable against the stronger. He considered that there was no reason why this authority should not apply to contracts made under section 24 of the 1948 Act, and that there may be many other cases where the same distinction applies.[20] Lord Simon also considered[21] that the use of the phrase "contracting out" may be a little misleading, if an earlier authority which he quoted were correctly decided, as to which he stated he had some reservations. He therefore made a possible qualification to this phrase, on the basis of this distinction

between an executory agreement and an executed agreement. (According to the English definition, a contract is said to be executory so long as anything remains to be done under it by any party, and executed when it has been wholly performed by all parties.[22])

30. So in Johnson v. Moreton, while the House of Lords decided that an agreement entered into by parties to contract out of the public interest provisions of the Acts is not enforceable, nevertheless there was left open the possibility that such an agreement, which provides for a specific consideration and which has been carried out by the weaker party, would be enforceable.

31. There is in fact authority which recognises that parties to a lease can make an agreement during the currency of the lease to terminate it on the due date without strictly observing the statutory formalities in this respect - this can be achieved by either party serving on the other a notice to quit or a notice of removal, whether the notice is valid or not and whether timeous or not, and by the acceptance of that notice by the other party.[23] Once accepted, the notice cannot be withdrawn. This authority therefore recognises that, in this way and in these particular circumstances, parties can terminate the lease by agreement and in doing so, can in effect contract out of the statutory notice provisions relating to termination.

32. In the English case of Elsden v. Pick[24], for example, the lease in question was held to be terminated on the due date by service of a notice which was not timeous, but which was accepted. In this case, Lord Justice Shaw stated:-

> "... the time for the ending of a tenancy is a matter of common interest both to a landlord and to his tenant. It may suit them both to terminate a tenancy without waiting for what may be as long as nearly two years to bring it to an end. No statute could have so absurd an intention as to constrain a landlord and a tenant of an agricultural holding to remain bound in that relationship at a time when neither desires that it should endure. If they are in accord, can it matter whether they demonstrate that accord by an agreement to surrender or an agreement to accept short notice?"[25]

33. In so far as other provisions of the 1949 Act have a bearing on this issue, by reflecting the policy of the legislation in relation to contracting out of section 24(1) during the currency of the lease, we have already in

paragraph 16 above drawn attention to section 10. This section, in the circumstances stated, entitles the landlord or the tenant, with the consent of the other, to treat the lease as being at an end. Also of significance is section 24(5) of the Act,[26] which provides that nothing in the section shall affect the right of the landlord of an agricultural holding to remove a tenant whose estate has been sequestrated, or who has incurred an irritancy of his lease or other liability to be removed. The policy of the legislation as found in this subsection seems therefore to exclude from the operation of section 24(1) a case in which the landlord has been able to stipulate that the tenant can, in certain circumstances, incur liability to be removed. The scope of this provision is not however clear.

34. However, the Court of Session in Morrison's Exrs. interpreted the prohibition in section 24(1) of the 1949 Act of contracting out as extending to such agreements made during the currency of the lease as well as in advance of the commencement of the lease. This latter decision was based apparently on an interpretation of the wording of the provision itself, and policy reasons in the Act were not identified in support of the decision.

35. In conclusion, we have not, either in the Acts or from the case-law thereon, identified any policy objective in the legislation which requires a prohibition on contracting out, during the currency of the lease, of the statutory notice provisions of section 24(1) of the 1949 Act. On the contrary, there are indications which may give encouragement to the view that such contracting out during the currency of the lease is, as a matter of policy, acceptable.

Review of prohibition on contracting out

36. The provisions of section 24(1) of the 1949 Act, requiring notice in order to terminate an agricultural lease, are of crucial importance to the parties to a lease, both landlord and tenant. It is vital that, during the time when it is required, the protection given by this provision to both parties is not avoided or deprived of effect in any way. It is possible that the avoidance of this protection could be attempted by, for example, the imposition in the lease or in a separate agreement made before the commencement of the lease of a clause stating that the parties contract out of the provisions of section 24(1), or will at a later date (say, during the currency of the lease) enter into an agreement to do so then.

Agreement to such a stipulation might be held out to a tenant during the negotiation of the lease as a condition of his obtaining the grant of the lease. Often a prospective tenant would have to, or feel he has to, accept such a stipulation in order to obtain the grant of the lease, since during the stage of negotiation the tenant is frequently in a weaker bargaining position in relation to the landlord.

37. In fact, in the normal case where the date of entry to the subjects of lease is a date occurring after the conclusion of the contract of lease, it is not until that date of entry, when the tenant enters into possession of the subjects, that he is in a secure position in relation to the landlord. This applies even though the tenant may, in advance of the agreed date of entry, have occupied part of the leased subjects so as to prepare the ground and sow crops. In such a case, the occupation is merely the exercise of a limited right or privilege in advance of the true date of entry.[27] As at the date of entry, on entering into possession, the personal right which the tenant had under the lease can, in the circumstances under the Leases Act 1449,[28] be perfected into a real right which is valid against singular successors. Furthermore, as at that date, the tenant obtains security of tenure under the 1949 Act. Accordingly, the tenant is in a vulnerable position even after the conclusion of the contract of lease, and until the date of entry to the leased subjects.

38. For these reasons, and as already identified during our consideration of the policy of the Acts in paragraphs 26 to 35 above, the Acts contain the policy objective of protecting the tenant during the period of time up to the date of entry, when the lease commences. It is obvious that this policy is a vital one to the Acts, and we do not intend to amend or otherwise disturb this policy in any way whatsoever. Accordingly, in section 24(1) of the 1949 Act, there is, as there must be in terms of this policy, a prohibition on contracting out of the provision. This prohibition certainly covers agreements made, in the lease or otherwise, before the commencement of the lease - i.e. during the period in which, as we have noted, the tenant is in a vulnerable position and requires statutory protection.

39. However the question which arises is whether that prohibition in section 24(1) should extend any further in time, so as to prohibit contracting out agreements made subsequent to the commencement of the lease - as indeed the prohibition has, on its present wording, been

interpreted to so do by the Court in Morrison's Exrs. In this context, we have already found that the date on which the tenant enters into possession of the subjects of lease is in fact a landmark in time. As pointed out, on that date the tenant obtains a real right and receives security of tenure under the 1949 Act. His position in relation to the landlord would then have significantly improved. He would then be able to resist any undue pressure exerted on him, in an attempt to obtain his agreement to contract out of the provisions of section 24(1). The tenant would be able, as he wished, either to agree to such an approach if it was in his interest to do so, or otherwise refuse and insist on receiving the notice required by that provision.

40. It appears therefore that the prohibition on contracting out in section 24(1) is required in the public interest to prohibit only contracting out agreements made in advance of the date on which the tenant enters into possession of the subjects, but is not required to cover any agreements made after this date during the currency of the lease.

41. Indeed, it would seem to be the case that a wide prohibition in section 24(1), which prohibited agreements made during the currency of the lease, would prove in fact to be unduly restrictive. In Part II of this Paper there were considered various types of circumstances in which both parties, each acting on the basis of a reasonable bargaining position in relation to the other, might in fact wish to contract out of that provision during the currency of the lease. In such cases, it appears to be in the interests of both parties to allow this course of action. This tends to suggest that, despite the decision in Morrison's Exrs., such agreements might continue to be made in practice where it suits the parties to do so. As pointed out by the Lord Justice-Clerk in that case,[29] such agreements would be effective if both parties acted on the basis of the agreement. However, if one party does not so act, difficulties will then be experienced with regard to the enforcement of the agreement.

42. In relation to a prohibition on contracting out in section 24(1) which covered only agreements made in advance of the commencement of the lease, there could, as we have already noted, be attempts to circumvent this protection by means of seeking to obtain an agreement, before the commencement of the lease, binding the parties to enter into a contracting out agreement at a later date during the currency of the lease itself. However this prohibition would cover this situation, since such attempts

to circumvent the statutory provisions are, as seen in Johnson v. Moreton, interpreted by the courts as being struck at by the prohibition and are therefore invalid. In the case mentioned, their Lordships were concerned that any such arrangement could become a standard stipulation in the grant of a lease, and considered that any such practice would have the effect of rendering the protection of the statute a "dead letter".[30] Likewise, during the period of time when contracting out would be prohibited in terms of such a provision, parties could enter into an agreement which, by use of different technical language, purported not to be a contracting out agreement, but in practice had the effect of being so. In such instances, the courts would no doubt consider the terms of such an agreement, identify it as a contracting out agreement despite the attempt to disguise this, and find it to be invalid by reason of being struck at by the statutory prohibition.[31]

43. From this review of the prohibition on contracting out of the statutory protection contained in section 24(1) of the 1949 Act, we therefore conclude by suggesting that, while such a prohibition is necessary and is vital to the interests of the parties, it need in fact cover the period in time only up to the date on which the tenant enters into possesssion of the subjects in terms of the lease agreement. There does not appear to be any policy reason in the Acts, nor any practical reason, why parties should not be entitled to contract out of section 24(1) after this date, and at any time during the currency of the lease. Moreover, to have in the statute a prohibition on contracting out during the currency of the lease would appear to be at least inconsistent with the common law, under which parties might be able, despite the statutory prohibition, to achieve the practical result they wish by agreeing a renunciation of the lease.

44. We therefore invite views on the following question:-

1. Do consultees agree that parties to an agricultural lease should, at any time during the currency of the lease after the date on which the tenant enters into possession of the subjects in terms of the lease agreement, be entitled to contract out of the statutory notice provisions relating to termination of the lease as contained in section 24(1) of the 1949 Act?

PART IV: NON- AGRICULTURAL LEASES

45. The current provisions relating to removings from non-agricultural subjects prescribe a minimum period of notice, depending partly on the nature of the leased subjects and partly on the period of lease. These provisions are contained in sections 34 to 38A of, and Rules 103 to 107 of Schedule 1 to, the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act"). While it is the case that a notice is required so as to exclude tacit relocation of the lease, and as a foundation for a subsequent action of removing, there does appear also to be a public interest in these provisions. The requirement to provide a minimum period of notice offers a safeguard to the tenant, who frequently finds himself in a weaker bargaining position than that of the landlord during the period of negotiation of the lease. Accordingly in terms of the statute the tenant should receive a notice, warning him of the termination date of the lease and giving a minimum period of notice in which a removal may be arranged. However while some appear to regard these statutory provisions as superseding any conventional provision on this matter,[1] there seems to be doubt as to whether this is in fact so. An alternative view is that the 1907 Act dealt primarily with courts and their procedure, so the rules it prescribes regarding matters such as notices to quit apply only where a form of process for which it makes provision is being adopted.[2]

46. In our Memorandum however we put forward for consideration the proposition that any prescribed minimum period of notice of termination of a non-agricultural lease should apply whatever the form of process and irrespective of any different provision in the lease between the parties or otherwise agreed by them.[3] This was agreed to by all consultees who replied to this proposition. Accordingly we are giving consideration to recommending in our Report that, in relation to non-agricultural leases of a type capable of being continued in force by tacit relocation, the lease shall not come to an end by virtue of the termination of the stipulated endurance of the lease (or, where the lease has been so continued in force, by virtue of the termination of the period for which it has been so continued in force) unless written notice of a stipulated minimum period has been given by one party to the other of his intention to bring the tenancy to an end. Such a recommendation, and our discussion here on contracting out, would not of course affect leases which are not capable of being continued in force by tacit relocation, since a notice is not required for the termination of such leases.

47. In our view a statutory provision which implemented such a recommendation should, as a matter of policy, contain a prohibition on contracting out therefrom before the date on which the tenant enters into possession of the subjects in terms of the lease agreement. Such a prohibition would be necessary to protect the interests of both parties, and in particular the tenant who is, in relation to the landlord, normally in a weaker bargaining position. In Part III of this Paper, in relation to agricultural leases, we have already examined in detail the necessity of having such a prohibition and, broadly speaking, similar reasoning applies in relation to non-agricultural leases.

48. As already identified in Part II of this Paper, there would appear to be circumstances in which parties to a non-agricultural lease might wish to enter into a contracting out agreement during the currency of the lease.

49. There do not seem to be any policy or practical reasons to restrict the parties' freedom of contract in this respect after the date on which the tenant enters into possession of the subjects. Indeed, as in the case of agricultural leases, such a prohibition would appear to be unduly restrictive, and would be inconsistent with the common law method of renunciation of a lease which is open to parties during this time and which would achieve the same practical result.

50. Accordingly we suggest that, in relation to non-agricultural leases, parties should have a right to contract out of any statutory notice provisions relating to termination, similar to that we have already suggested in paragraph 43 above in relation to agricultural leases.

51. We therefore invite views on the following question:-

2. Do consultees agree that parties to a non-agricultural lease should, at any time during the currency of the lease after the date on which the tenant enters into possession of the subjects in terms of the lease agreement, be entitled to contract out of such statutory notice provisions relating to termination of the lease as we may recommend in our forthcoming Report?

PART V - SUMMARY OF QUESTIONS FOR CONSIDERATION

52. Note. Attention is drawn to the notice at the front of the consultation paper concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this paper may be referred to or attributed in our subsequent report.

1. Do consultees agree that parties to an agricultural lease should, at any time during the currency of the lease after the date on which the tenant enters into possession of the subjects in terms of the lease agreement, be entitled to contract out of the statutory notice provisions relating to termination of the lease as contained in section 24(1) of the 1949 Act?
(Paras. 36-44)

2. Do consultees agree that parties to a non-agricultural lease should, at any time during the currency of the lease after the date on which the tenant enters into possession of the subjects in terms of the lease agreement, be entitled to contract out of such statutory notice provisions relating to termination of the lease as we may recommend in our forthcoming Report?
(Paras. 45-51)

NOTES TO PART I

1. 1986 S.L.T. 227.

2. See para. 46 below.

NOTES TO PART III

1. See e.g. ss. 3 (tacit relocation), 12 (freedom of cropping etc), 16 (penal rents etc).

2. See e.g. s. 11 (agreements between landlord and incoming tenant as to payment of compensation to outgoing tenant).

3. Paton and Cameron, Landlord and Tenant (1967) at p.310.

4. 1956 S.C. 39.

5. The Lord President (Clyde) at p.44, and Lord Sorn at p.49.

6. Gill, The Law of Agricultural Holdings in Scotland (1982) at para. 122.

7. Gill, Ibid, p. 89 at Note 14.

8. Section 10 of the 1949 Act reads:-
"The lease of an agricultural holding shall not be deemed to have been brought to an end, and accordingly neither the landlord nor the tenant of the holding shall be entitled to bring proceedings to terminate the lease or, except with the consent of the other party, to treat it as at an end, by reason only that any new term has been added to the lease or that any of the terms of the lease (including the rent payable thereunder) have been varied or revised in pursuance of any of the foregoing provisions of this Act in that behalf."

9. Paton and Cameron, op. cit. at p.238; Rankine, The Law of Leases in Scotland (3rd edn. 1916) at p. 522-3.

10. Morrison's Exrs. v. Rendall 1986 S.L.T. 227 at 230 F-G.

11. Ibid, p. 230E.

12. Ibid, p. 230J.

13. Ibid. p. 232C.

14. Ibid, p. 232D.

15. Ibid., pp. 233L-234A.

16. Turnbull v. Millar 1942 S.C. 521 at p.532.

17. Earl of Galloway v. McClelland, 1915 S.C. 1062 at pp. 1099-1100.

18. [1980] A.C. 37.

19. Ibid., pp. 59-61.

20. Ibid., p. 61.

21. Ibid., p. 65.

22. Halsbury's Laws of England (4th edn. 1979) Vol. 9, para. 206.

23. Gilmour v. Cook 1975 S.L.T. (Land Ct) 10 at p.12; Cushnie v. Thomson 1954 S.L.C.R. 33; cf. Gilmour v. Osborne's Trs. 1950 S.L.C.R. 30; Edell v. Dulieu [1924] A.C. 38; Freeman v. Evans [1922] 1 Ch. 36 at p.43; Westlake v. Page [1926] 1 K.B. 298; Elsden v. Pick [1980] 1 W.L.R. 899.

24. op. cit.

25. op. cit., at p. 905.

26. Section 24(5) of the 1949 Act reads as follows:-
"Nothing in this section shall affect the right of the landlord of an agricultural holding to remove a tenant whose estate has been sequestrated under the Bankruptcy (Scotland) Act, 1913*, or who by failure to pay rent or otherwise has incurred any irritancy of his lease or other liability to be removed."

*This reference is now construed as a reference to the Bankruptcy (Scotland) Act 1985, in accordance with section 75(10) of that Act.

27. Millar v. McRobbie 1949 S.C.1.

28. 1449 c.6.

29. Morrison's Exrs. v. Rendall op. cit., p. 230J.

30. Johnson v. Moreton op. cit. - see for example Lord Simon of Glaisdale at p.69.

31. See for example Lord Templeman's statement in Street v. Mountford (1985) 2 W.L.R. 877 at p.884, concerning an agreement attempting to avoid the protection of the Rent Acts.

NOTES TO PART IV

1. Dobie, Sheriff Court Practice, (1952) p. 410, founding on Duguid v. Muirhead, 1926 S.C. 1078, per Lord Constable at pp. 1082-3.

2. Cowdray v. Ferries 1918 S.C. 210.

3. Memorandum No. 59 on Recovery of Possession of Heritable Property, Proposition 10, para. 2.19.